Jamaliah bte Hj Mahsudi (suing on her own behalf and as administratrix of the estate of Salamah bte Hj Ali) & Ors v Sivam a/l Munsamy & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 22–325 OF 1996
FAIZA TAMBY CHIK J
5 OCTOBER 1998

Civil Procedure *— Summary judgment — Delay in application for summary judgment — Application made after filing of defence — Whether counsel's explanation for delay had merit — Whether objection of delay is a valid objection*

Land Law *— Transfer — Indefeasibility of title — Bona fide purchaser for value — Transfer of land affected by a flawed power of attorney — Exception to indefeasibility rules applies — National Land Code 1965 s 340(2)(b)*

The plaintiffs applied for summary judgment against the second defendant, seeking that they and the estate of the deceased be restored as registered owners of a certain piece of land ('the land'). The land was transferred to the second defendant by the first defendant, acting as the attorney of the plaintiffs and the deceased. The plaintiff contended that the power of attorney ('the PA') was defective in that the deceased, as one of the donors of the PA, had died three years prior to the granting of the PA, and hence could not have signed it. On the other hand, the second defendant submitted that he was a bona fide purchaser for value and raised two preliminary issues, ie that: (i) the plaintiffs' application was outside the ambit of O 14 of the Rules of the High Court 1980 ('the RHC') as the plaintiffs' action was based on fraud; and (ii) that the plaintiffs' application should have been filed prior to the filing of the defendant's defence, and the explanation proffered by the plaintiffs' counsel explaining the delay was without merit.

Held, allowing the application:

(1) Before a PA can be valid, it must be executed and authenticated in accordance with s 3(1) of the Powers of Attorney Act 1949. The death of the deceased prior to the date of the PA meant that s 3(1) had not been complied with, which would bring about the fatal consequence that the PA was fundamentally flawed. Since the transfer of the land in favour of the second defendant was affected by means of a fundamentally flawed PA, the transfer would also be similarly flawed and ineffective. The exception to the indefeasibllity rule would apply to render the second defendant's title to the land defeasible. It was irrelevant whether or not he was a bona fide purchaser for value (see pp 253G and 254A–B, E).

(2) The transfer of the said land in favour of the second defendant was bad at the time of the transfer because no grant of letters of administration had been obtained for the estate of the deceased

A and no order of court had been obtained sanctioning the sale of the deceased's undivided share in the land. The grant of letters of administration for the estate of the deceased was only obtained and extracted by the first plaintiff four years after the purported transfer. By virtue of s 39 of the Probate and Administration Act 1987, when the deceased died on 8 August 1987, her undivided B share in the land shall vest in the official administrator and the first defendant had no locus standi to transfer the land (see p 254F–I).

(3) The technical objection of delay is not a valid objection. A proposition that an application for summary judgment may be C defeated solely on the ground that there had been a delay in moving the court runs counter to the interest of justice. That delay cannot provide an answer to an application made under O 14 where there are no bona fide triable issues (see p 256A–B); *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 followed.

D

[Bahasa Malaysia summary

Plaintif-plaintif telah memohon untuk penghakiman terus terhadap defendan kedua, yang meminta agar mereka dan harta pusaka si mati dikembalikan sebagai pemilik berdaftar sebidang tanah tertentu E ('tanah tersebut'). Tanah tersebut telah dipindahmilik kepada defendan kedua oleh defendan pertama, yang bertindak sebagai wakil plaintif-plaintif dan si mati. Plaintif-plaintif menghujahkan bahawa surat kuasa wakil ('SKW') adalah tidak sempurna dalam ertikata bahawa si mati, sebagai salah satu daripada penyumbang SKW, telah F meninggal dunia tiga tahun sebelum pemberian SKW, dan justeru itu tidak mungkin telah menandatanganinya. Sebaliknya, defendan kedua berhujah bahawa ia merupakan pembeli bona fide untuk nilai dan membangkitkan dua isu permulaan, iaitu bahawa: (i) permohonan plaintif-plaintif adalah di luar lingkungan A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana tindakan G plaintif-plaintif adalah berdasarkan fraud; dan (ii) permohonan plaintif-plaintif seharusnya difailkan sebelum pemfailan pembelaan defendan, dan penjelasan yang diberikan oleh peguam plaintif-plaintif yang menerangkan kelewatan adalah tanpa merit.

H **Diputuskan**, membenarkan permohonan:

(1) Sebelum suatu SKW boleh menjadi sah, ia mestilah dilaksanakan dan disahkan menurut s 3(1) Akta Surat Kuasa Wakil 1949. Kematian si mati sebelum tarikh SKW bermakna bahawa s 3(1) telah tidak dipatuhi, yang akan membawa akibat padah bahawa SKW adalah cacat dari segi dasarnya. Memandangkan I pindahmilik tanah tersebut atas nama defendan kedua terjejas oleh SKW yang cacat dari segi dasarnya, pindahmilik tersebut dalam cara yang sama juga adalah cacat dan tidak berkesan. Kekecualian kepada rukun ketakbolehan disangkal akan terpakai

bagi menyebabkan hakmilik defendan kedua kepada tanah tersebut menjadi boleh disangkal. Adalah tidak relevan sama ada ia adalah pembeli bona fide untuk nilai atau tidak (lihat ms 253G dan 254A–B, E).

(2) Pindahmilik tanah tersebut atas nama defendan kedua adalah tidak elok pada masa pindahmilik kerana tiada pemberian surat kuasa mentadbir telah diperolehi untuk harta pusaka si mati dan tiada perintah mahkamah telah diperolehi yang membenarkan penjualan bahagian si mati dalam tanah tersebut yang tidak dibahagi. Pemberian surat kuasa mentadbir untuk harta pusaka si mati hanya didapatkan dan diekstrakkan oleh plaintif pertama empat tahun selepas pindahmilik yang dikatakan. Melalui s 39 Akta Probet dan Pentadbiran 1987, apabila si mati meninggal dunia pada 8 Ogos 1987, bahagian si mati dalam tanah tersebut yang tidak dibahagi haruslah diletakhak dalam pegawai pentadbir pusaka dan defendan pertama tidak mempunyai locus standi untuk memindahmilik tanah tersebut (lihat ms 254F–I).

(3) Bantahan teknikal tentang kelewatan bukanlah bantahan yang sah. Kenyataan bahawa suatu permohonan untuk penghakiman terus boleh ditewaskan semata-mata atas alasan bahawa terdapat kelewatan dalam permohonan kepada mahkamah adalah bertentangan dengan kepentingan keadilan. Kelewatan itu tidak boleh menyediakan jawapan kepada permohonan yang dibuat di bawah A 14 di mana tidak terdapat isu bona fide yang boleh dibicarakan (lihat ms 256A–B); *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 diikut.]

Notes

For cases on delay in application for summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4510–4529.

For cases on indefeasibility of title, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2907–2914.

Cases referred to

Boonsoom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Lim Cheng Kwang v Sivamalai d/o Sinnathambi & Anor [1994] 2 CLJ 59 (refd)

Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818 (folld)

Puran Singh v Kehar Singh & Anor [1939] MLJ 71 (refd)

Legislation referred to

National Land Code 1965 s 340(2)(b), (3)
Powers of Attorney Act 1949 s 3(1), (2)
Probate and Administration Act 1959 ss 39, 60
Rules of the High Court 1980 O 14 r 1(1)

A *PY Chong* (*Nordin Torji & Partners*) for the plaintiffs.
AG Kalidas (*Nadarajah & Partners*) for the defendants.

Faiza Tamby Chik J:

This is an application for summary judgment (encl 8) under O 14 r 1(1) of the Rules of High Court 1980 ('the RHC') against the second defendant. It B is supported by the following affidavits:

(1) The first affidavit affirmed on 7 January 1997 by Mohd Nooh bin Abdullah, the husband of the first plaintiff who is suing in her personal capacity as well as in her capacity as administratrix of the estate of Salamah bte Hj Ali ('the deceased').

C (2) The second affidavit affirmed on 4 April 1997 by the six plaintiffs.

(3) The third affidavit affirmed on 23 April 1997 by Chong Phow Yew, counsel for the plaintiffs.

In this action, the plaintiffs are seeking, inter alia, that they and the estate of the deceased be restored as registered owners of the land held under D GM 716, Lot No 5372 Mukim Kapar, Selangor ('the land'). A copy of the title deed has been exhibited as 'M1' in the first affidavit. The land was on 5 February 1991 transferred to the second defendant by the first defendant acting purportedly as the attorney for the plaintiffs and the deceased. The instrument of transfer dated 12 November 1990 and the power of attorney dated 30 October 1990 have been respectively exhibited as 'M8' and 'M7' E in the first affidavit.

It is the plaintiffs' contention that the power of attorney (M7) ('the PA') is defective in that the deceased, as one of the purported donors of the PA, died on 8 August 1987, three years prior to the granting of the PA and hence could not have signed the PA. A copy of the death certificate of the deceased F has been exhibited as 'M2' in the first affidavit. The fact that the deceased died on 8 August 1987 in the light of the death certificate cannot be controverted and the expenses of having a full trial to establish this fact is unnecessary.

Before a PA can be valid, it must be executed and authenticated in accordance with s 3(1) of the Powers of Attorney Act 1949 ('the PA Act). G This is so provided under s 3(2) of the PA Act. Section 3(1) of the PA Act provides as follows:

> No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within West Malaysia unless:
>
> H (a) if executed within West Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by —
>
> (i) ...
>
> (ii) ...
>
> I (iii) ...
>
> (iv) ...
>
> (v) a Commissioner for Oaths; or ... .

The death of the deceased prior to the date of the PA must surely mean that s 3(1) of the PA Act has not been complied with, which would bring about the fatal consequence that the PA is fundamentally flawed. Since the transfer of the land in favour of the second defendant was effected by means of a fundamentally flawed PA, the transfer would also be similarly flawed and ineffective. In the case of *Puran Singh v Kehar Singh & Anor* [1939] MLJ 71 where:

> The appellant was the registered proprietor of certain lands. He resided in India. The first respondent, his brother held his power of attorney which contained a power to substitute. The first respondent, being about to visit India, executed a power of attorney in the name of the appellant in favour of one FS signing the instrument, not as attorney of the appellant, but as 'Puran Singh' the appellant. This instrument was a facsimile of the instrument from the appellant to the first respondent. On proceeding to India the first respondent himself gave a power of attorney to the second respondent. A little later FS in exercise of the power of substitution executed a substitute power of attorney in favour of the second respondent. The second respondent, by virtue of the substituted power of attorney transferred the aforesaid lands to the first respondent. The appellant sued for a declaration that the transfer of the lands to the first respondent was void.
>
> Held, that the registration of the first respondent had been effected by means of an 'insufficient instrument'.

It is therefore concluded that the exception to the indefeasibility rule applies to render the title of the second defendant to the said land defeasible. See s 340(2)(b) of the National Land Code ('the NLC').

Another reason why the transfer of the said land in favour of the second defendant is bad is that at the time of the transfer, no grant of letters of administration has been obtained for the estate of the deceased and no order of court has been obtained sanctioning the sale of the deceased's undivided share in the land. The grant of letters of administration for the estate of the deceased was only obtained and extracted by the first plaintiff on 7 September 1995 — four years after the purported transfer. A copy of the grant of letters of administration has been exhibited as 'M3' in the first affidavit.

Section 39 of the Probate and Administration Act 1959 ('the PAA') provides as follows:

> (1)Where a person dies intestate his movable and immovable property until administration is granted in respect thereof shall vest in the Corporation in the same manner and to the same extent as it vest in the Probate Judge in England.
>
> (2) On the making of an order for a grant of administration by the Court all such property shall vest in the administrator.

Note: Prior to Amendment Act A912, the property shall vest in the official administrator and not the corporation.

It is noted that when the deceased died on 8 August 1987, her undivided share in the said land shall, pursuant to s 39 of the PAA, vest in the official administrator and the first defendant had no locus standi to transfer the said land on 12 November 1990.

A It is further noted that even after the property has been vested in the administrator, any transfer must have the sanction of a court order. See s 60 of the PAA and the case of *Lim Cheng Kwang v Sivamalai d/o Sinnathambi & Anor* [1994] 2 CLJ 59 where the court stated at p 65:

> Applying the given facts of this instant case, again it is quite clear that the
> B defendants as administrators of the estate of the late Muthusamy have violated the provision of s 60(2) of the same Act in that no evidence of concurrence of all the personal representatives of the deceased had been obtained before the transfer and registration of the said property. This renders the said transfer as no transfer at all and it should be void ab initio for failure to comply with the requirement in s 60(2) of the said Act. The strict and stringent provision of
> C this statute ie Probate and Administration Act 1959 ensures the interest of all the beneficiaries are protected. It is therefore understandable that all process and procedure relating to the vesting of power and power of disposal are to be adhered strictly.
>
> However, these inactions are not valid excuses for the defendants to bypass the statutory procedure to effect transfer of ownership of property from
> D the estate of an intestate to themselves who are not beneficiaries of the estate of Lim Hock Seng, worst still, without the knowledge and consent of the beneficiaries of the said estate of Lim Hock Seng. Until the grant of LA is obtained by the plaintiff and with the consent of all the beneficiaries no one is empowered by law to have the intestate's property transferred and if so transferred it was not valid but void.

E The thrust of the second defendant's defence is that he is a bona fide purchaser for value. It is submitted by the plaintiffs that the defence in law does not carry weight as the Court of Appeal has, in the case of *Boonsoom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 at p 85, construed that the words 'any purchaser' appearing in the proviso to s 340(3) do not include a registered proprietor whose immediate title is rendered defeasible
F by one or more of the vitiating elements specified in the second subsection to s 340 of the NLC. Any other construction would, in the Court of Appeal's view, denude sub-s (2) of all effect. Since the second defendant's title to the said land in this case is rendered defeasible by the vitiating element in s 340(2)(b) where registration was obtained by means of an insufficient or void instrument, it is irrelevant whether or not he is a bona
G fide purchaser for value. In this case, the court came to the conclusion that the exception to the indefeasibility rules under s 340(2)(b) of the NLC applies for defeasibility is occasioned here because an insufficient instrument is used which is incapable of conferring any right, interest or title in favour of the acquirer of immovable property.

H Apart from repeating the defence that the second defendant is a bona fide purchaser for value, the affidavit has raised only two preliminary and technical issues as follows:

(a) The plaintiffs' application is outside the ambit of O14 as the plaintiffs' action is based on fraud (see paras 4 and 5 of his affidavit).

I (b) The plaintiffs' application should have been filed prior to the filing of the defendant's defence and it must be noted that the explanation proffered by the plaintiffs' counsel's third affidavit explaining the delay is without merit.

The technical objection of delay is no longer a valid objection after the decision of the Court of Appeal in the case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818. In that case, the Court of Appeal held that a proposition that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court runs counter to the interest of justice and that delay can surely provide no answer to an application made under O 14 where there are no bone fide triable issues. At p 821, the Court of Appeal said:

> In *Ng Hee Thoong*, the court reversed the High Court and granted leave to defend principally on the ground that the issue whether a valid demand had been made of the defendants in that case was plainly arguable. This court also took into account the fact that the plaintiff in that case had remained inactive for more than a year and then moved for summary judgment without giving notice of intention to proceed under the relevant provision of the RHC. When properly understood, there is nothing in *Ng Hee Thoong*'s case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O 14 where there are no bona fide triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

By reason of the foregoing, the court hereby grants an order in terms of the plaintiffs application.

Application allowed.

Reported by Mohd Rizal Abidin